

FEATURE

Mainstreaming the ‘Abortion Question’ into the Right to Health in Uganda

Robert Doya Nanima

The right to health is a social and economic right that requires progressive realisation by states (Chenwi 2013). Although Uganda’s Constitution does not provide for the right to health, the country is a signatory to the International Covenant on Economic, Social and Cultural Rights (UN General Assembly 1966). The Constitution contains other social and economic rights, such as the right to education, but the lack of the right to health has prompted several recommendations by the Committee on Economic, Social and Cultural Rights’ (CESCR) that Uganda take legislative and other measures to ratify and apply the rights in the ICESCR.

Another challenge relates to how a state party engages the progressive realisation of this right without undue regard to resource constraints (Fukuda-Parr et al. 2008). As will be shown, the challenge Uganda faces in the progressive realisation of the right to sexual and reproductive health with regard to abortion lies in its reservation to article 14 of the Maputo Protocol (Ngwenya 2016). This reservation should be subject to the Limburg Principles, which require that states parties begin the immediate implementation of the obligations under the ICESCR (UNCHR 1986).

The marginalisation of women in Uganda

Agriculture forms the backbone of Uganda’s economy. It has the potential to create lucrative livelihoods and lift thousands of Ugandans out of poverty, especially with the adoption of modern techniques and better quality inputs (World Bank 2016). Whereas women control only 27 per cent of plots and 20 per cent of all cultivated land, 73 per cent and 80 per cent, respectively, of the plots and cultivated land are managed either jointly by women and men or solely by men (UN Women 2015). Overall, 77 per cent of women are involved in agriculture, compared to 62 per cent of men alone (Derick, Daniel, Klaus & Duponchel 2015).

However, women’s engagement in activities that mitigate poverty is hindered by discrimination in various aspects of their lives (UN Women 2015). One notable area of discrimination is in the realisation of their socio-economic right to reproductive health – a situation which is due both to social, cultural and religious factors and to a general lack of knowledge of the extent of this right (Kembabazi 2016).

Uganda has an estimated 775,000 unintended pregnancies per annum, of which 25 per cent are among adolescents (NBS 2009). A total of 297,000 (38.3 per cent) result in abortions (Guttmacher 2013). While many women have unwanted pregnancies, they can only abort them secretly in dangerous conditions due to the poor conditions of health units, the shortage of qualified health practitioners, the lack of

medication and the influence of religion and culture on the practice of abortion. This negatively affects women's economic productivity.

Uganda is lagging behind in attaining Sustainable Development Goal (SDG) 5 of gender equality owing to its slow progress in reducing child mortality and illness (NBS 2009). Thus, there is a disconnection between the Ugandan woman's hard work and the failure to recognise her right to sexual and reproductive health. While she contributes to the economy, she is hampered by the lack of adequate protection under the law with regard to abortion. Her inability to make decisions about her sexual and reproductive rights (SRR) hinders her enjoyment of the highest attainable standard of health, which in turn affects her attempts to improve her economic well-being (Hunt & MacNaughton 2006).

The intent of article 14 of the Maputo Protocol

The Maputo Protocol promotes women's control of their sexual and reproductive health rights, which is a key indicator in advancing the MDG on gender equality (Maputo Protocol 2003). However, the recommendations on Uganda's fifth periodic report to the UN point out that the country's reservations to articles 14 and 21 of the Maputo Protocol impede the full enjoyment of women's health and reproductive rights with regard to medical abortion (CESCR 2015).

The Maputo Protocol requires that promotion of the SRR of women with regard to the decision whether to have children, the number of children, and the spacing of children (Maputo Protocol 2003). Uganda entered a reservation to article 14(2)(c), to the effect that the article would be interpreted subject to domestic legislation on abortion. Although it has been suggested that this reservation is limited to the application of article 14 of the Maputo Protocol without rendering abortion illegal (Ngwenya 2016), this position is not reflected in the wording of the reservation.

It is argued instead that Uganda seeks to maintain the domestic regulation of abortion in order to override the notion that a woman's right to abort forms part of the SRR. This position presents a

dangerous predicament. First, the reservation defeats the purpose of the Maputo Protocol. Secondly, it does not take into consideration the polarities that misinform the abortion question in Ugandan society (OAU 1981; Mujuzi 2008; Baderin 2005; Nsibirwa 2001). It is submitted that the cumulative effect of this reservation is a restriction on the ability of the Protocol to address the question of abortion.

The legal and policy regime on abortion

The marginalisation of women with regard to abortion is aggravated by the legal regime. The Constitution does not provide for the right to health. However, it provides that no one has the right to terminate the life of an unborn child unless its authorised by the law (Constitution 1995). This provision, though, does not provide adequate guidance on the grounds for abortion in Uganda. It is thus instructive to look at other provisions before one turns to the subsidiary legislation.

The Constitution recognises equality between women and men, which is amplified by the requirements for freedom from discrimination, for affirmative action in favour of women, and for outlawing practices that undermine the welfare, dignity and interests of women. It may be argued that provisions that undermine the welfare and dignity of women are effectively against a woman's attempt to secure a livelihood. The Ugandan courts have ruled in *Salvatori Abuki v the Attorney General* (1997) that the right to life encompasses the right to engage other rights which enable one to have a livelihood. As such, while the Constitution recognises the right to life, it also recognises the special role of a woman in society and affords her rights against discrimination and to equality with men. These provisions have to be reconciled with each other and used as a guide in 'mainstreaming' the abortion question.

The Penal Code Act (PCA) has various provisions that speak to the position of abortion in Uganda. It provides, for instance, that

[a]ny person who, with intent to procure the miscarriage of a woman ... unlawfully administers to her or causes her to take any poison or other noxious thing ... or uses any other means, commits a felony



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and is liable to imprisonment for fourteen years (PCA, section 141).

This section of the Act makes several dangerous assumptions about abortion. First, it does not qualify the type of person referred to. In so doing, it fails to recognise persons with professional qualifications and experience, such as doctors and other medical officers. It conflates professionals with all other persons. Secondly, on the basis of this conflation, it implies that such persons, regardless of their professional qualifications or experience, have the intention of procuring an abortion – an act which is portrayed in a false negative light. The intention, indeed, may be to save the mother’s life or to uphold the rights of the mother, among other things, an intention which is then put into practice by procuring an abortion.

Thirdly, the section assumes that abortion is a mode of family planning that is outlawed by the section. It is argued that abortion should not be seen as a form of family planning but as a mode of promoting the SRR of the woman. Therefore, this provision is based on assumptions that do not take into account the various circumstances that may inform a Ugandan woman’s decision to procure an abortion.

A similar section provides:

Any person who unlawfully supplies to or procures for any person any thing, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, commits a felony and is liable to imprisonment for three years (PCA, section 141).

Section 141 adds to the previous section by criminalising the actions of the person referred to therein. To reiterate, the two sections fail to capture the reasons that may lead a woman to procure an

abortion. The cumulative effect of these two provisions is to discriminate against the woman on account of her sex and her need to decide when to have a child. This discrimination is further evident in the failure of the penal laws to appreciate the SRR of a woman, in view of the community’s misconceptions about abortion.

Furthermore, the PCA provides that

[a]ny woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means, or permits any such things or means to be administered to or used on her, commits a felony and is liable to imprisonment for seven years (PCA, section 141).

This provision criminalises a woman’s attempt to procure an abortion on herself. While this is a good provision insofar as it criminalises abortion where a woman performs it herself, it fails to engage with the circumstances of the woman who has done so: there is a need to focus on the ‘why’ question.

The final provision in the Penal Code that deals with abortion states as follows:

A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his or her benefit, or upon an unborn child for the preservation of the mother’s life, if the performance of the operation is reasonable, having regard to the patient’s state at the time, and to all the circumstances of the case (PCA, section 224).

The wording of this section indicates that one has a defence, with regard to prosecution under the Act, where one can prove that one acted in good faith and with reasonable care in performing the operation to save a mother’s life. What should be noted is that this section comes into effect after one has been arrested and perhaps prosecuted. As a result, the persons who have acted in good faith and with reasonable care are still subjected to the same process as those who have not exercised good faith, before the defence is engaged. This defence may not fend off possible conviction. It may instead be used to mitigate the sentence in terms of the length of imprisonment and the amount of the fine payable. The application of the

penal provisions results in practices that undermine the welfare and dignity of women in the field of reproductive rights. Consequently, the provisions fail to reflect the constitutional values that are ascribed to a woman.

Apart from the legal framework, the policy framework needs to be addressed as well. First, the National Gender Policy (NGP) recognises gender as a concept that is useful in understanding the social roles and relations of women and men of all ages and how these impact on development (NGP 1997). With regard to SRR, the NGP, at its core, has a specific strategy to develop and implement sexual and reproductive health rights programmes. It follows that reduction of the high teenage pregnancy rate, which addresses the discriminatory tendencies that the penal laws present, form part of this agenda.

On a positive note, the NGP recognises the high incidence of teenage pregnancies and the risks that arise for the health of the mother and child (NGP 1997). Given that Uganda is a signatory to the International Conference on Development and Population (ICDP), the policy reiterates the government's commitment to the promotion of sexual and reproductive health rights by putting gender relations at the centre of health and population interventions. The position consequently raises questions about Uganda's reservation with regard to the implementation of the Maputo Protocol. Furthermore, it questions the ability of the PCA to promote the SRR of women in view of the dangerous presumptions on which it is based. Therefore, while the NGP recognises the person of a woman and the particular realities she faces, the penal laws criminalise abortion. As such, the policy and the laws represent a parallel engagement in dealing with abortion in Uganda.

In addition, the Uganda National Policy Guidelines and Service Standards for Sexual and Reproductive Health Rights (GSS) were adopted to address all aspects of SRR. This was a broad-based approach that moved beyond a narrow engagement with family planning and maternal health (International Conference on Population and Development 1994). The GSS recognise that the prevention and management of unsafe abortion is a component of

sexual and reproductive health (GSS 2006). While this is a welcome development, it should be recalled that the PCA does not provide for safe abortion. It criminalises the acts of the person and the woman without clarifying what constitutes safe or unsafe abortions, and generalises all acts of abortion as illegal.

The GSS provide for comprehensive abortion care services for a woman or a couple seeking advice or services for termination on grounds, for instance, of life-threatening maternal illness, severe foetal abnormalities, cervical cancer or HIV, or rape, incest and defilement (GSS 2006). This is a radical departure from the general provisions of the PCA, insofar as they acknowledge the various situations that may require a woman to terminate a pregnancy. In addition, the GSS are silent on the use of abortion as a mode of family planning. As with the NGP, the GSS embrace the constitutional values of non-discrimination, affirmative action and equality.

However, the implementation of these values is curtailed by the general criminal provisions of the PCA. Therefore, the simultaneous application of the legal and policy regimes entails a parallel application of the regimes that does little to harmonise the contradictory positions regarding the abortion question. This position is similar to that in other policy documents, such as the National Policy on Post Abortion Care (NPPAC) and the Africa Plan of Action for Abortion (APAA).

Dealing with misconceptions

Uganda's reservation to the Maputo Protocol encourages the continued use of penal laws to criminalise abortion in instances other than those that place the mother's life at risk. This position does not reflect the various realities a woman may be facing that lead her to take the decision not to keep the child. This shallow position is reflected in the moral, social, religious and cultural reasons for abhorring abortion without appreciating the circumstances of the woman. It is submitted that these reasons are dangerous assumptions that do not justify controlling a woman's reproductive health.

The effect of the current approach is that there are competing priorities – on the one hand, the societal need to control a woman’s right to sexual and reproductive health, and on the other, the need to recognise a woman’s realities – but at the moment, the former is upheld at the expense of the latter. This should not be the case; indeed, there is no need for competition: instead there should be a conversation that harmonises the reasons put forward by the ‘competing camps’ of societal needs and of the woman’s realities.

Conclusion

Durojaye and Oluduro (2016) use an interesting principle to evaluate the African Commission’s jurisprudence on the rights of women. They argue that the African Commission’s development of jurisprudence on the rights of women requires that it not only ask the ‘woman question’ but the question that affects the ‘African woman’ (Durojaye & Oluduro 2016). When one asks the right question, the African woman has to be placed at the centre of any decision in the light of her realities. The realities of the woman should form the basis of the conversation, not the assumptions that are held by society. This approach will enhance the woman’s ability to contribute more effectively – and equitably – to Uganda’s economy.

Robert Doya Nanima is a doctoral (LLD) candidate and lecturer at the Faculty of Law, University of the Western Cape.

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